

FILED
Court of Appeals
Division II
State of Washington
8/4/2022 12:28 PM

NO. 56838-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CATHY MONTGOMERY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

Ryan A. Houser
Assistant Attorney General
WSBA #57742
Office Id No. 91022
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7721

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUES.....	2
	1. Montgomery filed her petition for review two days late because her counsel did not keep track of the due date. Did the trial court abuse its discretion when it affirmed the Board's order denying motion to vacate under CR 60(b)(1)?.....	2
	2. Montgomery filed her petition for review two days late because her counsel did not keep track of the due date. Did the trial court abuse its discretion when it affirmed the Board's order denying motion to vacate under CR 60(b)(11)?.....	2
III.	STATEMENT OF THE CASE	3
	A. Industrial Insurance Background.....	3
	B. Montgomery Filed Her Petition for Review Two Days After the Board's Deadline	5
	C. Montgomery Asked the Board To Vacate Its Final Order Under CR 60(b)(1) and CR 60(b)(11).....	8
	D. The Board Denied Montgomery's CR 60(b) Motion, and the Superior Court Affirmed	11
IV.	STANDARD OF REVIEW.....	13
V.	ARGUMENT.....	15

A. The Superior Court Did Not Abuse Its Discretion by Affirming the Order Denying Motion To Vacate Under CR 60(b)	16
1. CR 60(b)(1) does not provide a party relief for attorney mismanagement or negligence in calendarling deadlines.....	17
2. CR 60(b)(11) does not provide a party relief for attorney’s mismanagement or negligence in calendarling filing deadlines, even during periods of unusual circumstances in an attorney’s office.....	21
B. Under RCW 51.52.104’s Plain Language, Montgomery Filed Her Petition for Review Two Days Late.....	28
1. Montgomery did not file her petition within the time allowed by the Board, as RCW 51.52.104 requires	28
2. No legal authority or Board practice provides Montgomery with an additional three days after her petition for review due date to file her petition for review	32
VI. CONCLUSION.....	37

TABLE OF AUTHORITIES

Cases

<i>Arriaga v. Department of Labor & Industries,</i> 183 Wn. App. 817, 335 P.3d 977 (2014)	19
<i>B & J Roofing, Inc. v. Bd. of Indus. Ins. Appeals,</i> 66 Wn. App. 871, 832 P.2d 1386 (1992)	19, 31
<i>Beckman ex rel. Beckman v. State, Dep't of Soc. & Health Srvs.,</i> 102 Wn. App. 687, 11 P.3d 313 (2000)	26, 27
<i>Clauson v. Dep't of Labor & Indus.,</i> 130 Wn.2d 580, 925 P.2d 624 (1996)	36
<i>Coogan v. Borg-Warner Morse Tec Inc.,</i> 197 Wn. 2d 790, 490 P.3d 200 (2021)	14
<i>Cowiche Canyon Conservancy v. Bosley,</i> 118 Wn.2d 801, 828 P.2d 549 (1992)	34
<i>Dep't of Lab. & Indus. v. Lyons Enters., Inc.,</i> 185 Wn.2d 721, 374 P.3d 1097 (2016)	32
<i>Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area,</i> 190 Wn.2d 483, 415 P.3d 212 (2018)	34
<i>Graves v. Emp. Sec. Dep't,</i> 144 Wn. App. 302, 182 P.3d 1004 (2008)	19
<i>Harris v. Dep't of Labor & Indus.,</i> 120 Wn.2d 461, 843 P.2d 1056 (1993)	36
<i>In re Marriage of Burkey,</i> 36 Wn. App. 487, 675 P.2d 619 (1984)	18

<i>In re Robert A. Wiyrick,</i> No. 01 11323 & 01 12028, 2003 WL 25828990, *1-2 (Wash. Bd. Indus. Ins. App. Aug. 26, 2003)	19
<i>Lane v. Brown & Haley,</i> 81 Wn. App. 102, 912 P.2d 1040 (1996)	2, 15, 18
<i>Malang v. Dep’t of Labor & Indus.,</i> 139 Wn. App. 677, 162 P.3d 450 (2007)	13
<i>Matthews v. Dep’t of Labor & Indus.,</i> 171 Wn. App. 477, 288 P.3d 630 (2012)	19
<i>Nelson v. Dep’t of Lab. & Indus.,</i> 175 Wn. App. 718, 308 P.3d 686 (2013)	14
<i>One 1977 Blue Ford Pick-Up Truck,</i> 447 A.2d 1226 (Me. 1982)	27
<i>Reichelt v. Raymark Indus., Inc.,</i> 52 Wn. App. 763, 764 P.2d 653 (1988)	26, 27
<i>Rogers v. Dep’t of Labor & Indus.,</i> 151 Wn. App. 174, 210 P.3d 355 (2009)	13
<i>Seese v. Dep’t of Labor & Indus.,</i> 73 Wn.2d 213, 437 P.2d 694 (1968)	30
<i>Sepich v. Dep’t of Labor & Indus.,</i> 75 Wn.2d 312, 450 P.2d 940 (1969)	33, 34
<i>State v. Finch,</i> 137 Wn.2d 792, 975 P.2d 967 (1999).....	14
<i>State v. Gamble,</i> 168 Wn.2d 161, 225 P.3d 973 (2010)	21

<i>Wells v. Olsten Corp.</i> , 104 Wn. App. 135, 15 P.3d 652 (2001)	31
<i>Wingert v. Yellow Freight Sys., Inc.</i> , 146 Wn.2d 841, 50 P.3d 256 (2002)	36

Statutes

Laws of 1982, ch. 109, § 5	30
RCW 51.12.010	36
RCW 51.52.020	4, 36
RCW 51.52.060	3
RCW 51.52.104	3, 4, 5, 15, 28, 29, 30, 31, 32, 35
RCW 51.52.115	12, 13, 33, 34
RCW 51.52.140	13

Rules

CR 5(b)(2)(A)	35
CR 60(b)	8
CR 60(b)(1)	1, 2, 8, 11, 15, 17, 18, 19, 21, 37
CR 60(b)(11)	1, 2, 3, 8, 11, 15, 21, 22, 23, 37
RAP 1.1	26
RAP 10.3(a)(5), (6)	34
RAP 18.8	26, 27

RAP 18.8(b).....	26
RPC 5.1, 5.3.....	28

Regulations

WAC 263-12-015(3).....	4, 29
WAC 263-12-01501	35
WAC 263-12-01501(2)	4
WAC 263-12-01501(2)(d)	4, 29, 36
WAC 263-12-135	34

I. INTRODUCTION

Lawyers must keep track of deadlines to protect their clients. Montgomery missed the deadline to file a petition for review in her workers' compensation appeal because her lawyer committed the wrong deadline to memory, told his staff the wrong deadline, and did not verify the deadline in the Board of Industrial Insurance Appeals' (Board) letter until after he filed the petition two days late. A lack of diligence led to the late filing.

Recognizing the error, Montgomery filed a motion under CR 60(b)(1) and CR 60(b)(11) to vacate the Board's order that it did not timely receive a petition for review. The Board denied the motion, and the trial court affirmed.

Under the abuse of discretion standard that applies to denials of CR 60 motions—a standard that Montgomery does not cite or apply—she cannot show that the trial court had no tenable reasons to affirm the Board's denial of her CR 60 motion. Because an attorney's incompetence or neglect is not

sufficient grounds for relief from a judgment in a civil action, it was not manifestly unreasonable or untenable for the trial court to decline relief under CR 60(b)(1). *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996). It was not also an abuse of discretion to deny relief under CR 60(b)(11)—which requires a showing of extraordinary circumstances beyond a party’s control—where Montgomery’s counsel had full control over the circumstances that led to the late filing. Instead of calendaring the deadline or checking the due date in the file, he kept the (wrong) due date in his mind. The COVID-19 pandemic did not cause him to do this, so his arguments about COVID-19’s impact have no application here.

This Court should affirm.

II. ISSUES

1. Montgomery filed her petition for review two days late because her counsel did not keep track of the due date. Did the trial court abuse its discretion when it affirmed the Board’s order denying motion to vacate under CR 60(b)(1)?
2. Montgomery filed her petition for review two days late because her counsel did not keep track of the

due date. Did the trial court abuse its discretion when it affirmed the Board's order denying motion to vacate under CR 60(b)(11)?

III. STATEMENT OF THE CASE

A. Industrial Insurance Background

The Department of Labor and Industries (Department) issues orders in workers' compensation appeals. A party that disagrees with such an order may appeal to the Board. RCW 51.52.060. An industrial appeals judge issues a proposed decision and order after hearing evidence on the claim. RCW 51.52.104. A party that disagrees with a proposed decision and order of an industrial appeals judge in a workers' compensation appeal can file a petition for review to the three-member Board. RCW 51.52.104. The party must file the petition within 20 days of the Board's communication of the proposed decision or order, or within any additional time that the Board allows after a party's written request:

Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order

to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same.

RCW 51.52.104 (emphasis added). It is quite common for parties to receive extensions on the due dates so as to allow for ordering of the transcript.

The Board has adopted rules that allow parties to file petitions for review personally, by mail, by fax or by electronic filing. WAC 263-12-01501(2).¹ Electronic filing—the method that Montgomery chose in this case—is “accomplished by using the electronic filing link on the board’s website.” WAC 263-12-01501(2)(d). If a party electronically files a petition outside the Board’s customary hours of 8:00 a.m. to 5:00 p.m. on weekdays, the petition is “deemed filed” on the next business day. WAC 263-12-01501(2)(d); WAC 263-12-015(3).

¹ The Legislature has given the Board rulemaking authority “concerning its functions and procedure, which shall have the force and effect of law until altered, repealed, or set aside by the board” RCW 51.52.020.

If no party files a petition for review, the proposed decision and order “shall be adopted by the board and become the decision and order of the Board, and no appeal may be taken therefrom to the courts.” RCW 51.52.104. The proposed decision and order is “deemed adopted” by the Board on the day after the filing due date:

If an order adopting the proposed decision and order is not formally signed by the board on the day following the date the petition for review of the proposed decision and order is due, said proposed decision and order shall be deemed adopted by the board and become the decision and order of the board and no court appeal may be taken.

RCW 51.52.104.

B. Montgomery Filed Her Petition for Review Two Days After the Board’s Deadline

The Department issued three orders in Montgomery’s workers’ compensation claims that she appealed to the Board.² AR 42. In January 2020, an industrial appeals judge issued a

² The certified appeal board record is cited as “AR.”

proposed decision and order adverse to her on some issues.

AR 42-52.

Montgomery requested two extensions to file a petition for review, both of which the Board granted. AR 30, 32. In a letter dated March 2, 2020, the Board granted a second extension “for filing a petition for review to March 24, 2020.” AR 30.

As Montgomery concedes, she electronically filed her petition for review two days late, on the morning of March 26, 2020. Appellant’s Br. (AB) 2; AR 5. Later that afternoon, Montgomery’s counsel, Steven Busick, realized he had missed the March 24, 2020 deadline. AR 6. So, on March 27, 2020, he filed a “Request for Relief from Filing Date,” with a declaration from his legal assistant, Ashley Sturgis. AR 5-9.

In her declaration, Sturgis stated that, on March 18, 2020, Busick gave her a draft petition and “advised me that *he thought the Petition was due to file with the Board on March 26, 2020.*” AR 5 (emphasis added). Sturgis did not type the

petition until the weekend (which would have been March 21 and 22, 2020), but she completed typing and proofing the draft on March 23, 2020 for Busick to edit that evening. AR 6. Busick proofed that draft and, on March 24, 2020, Sturgis retyped it. AR 6. Sturgis stated that had she checked the client file, she would have realized the petition for review was due that day since the Board's March 2, 2020 letter was in the file. AR 5-6. She stated that in her "normal state of mind unaffected by the stress of COVID-19," she would have checked the petition's due date. AR 6. Instead, she and Busick continued working on the draft and filed it on March 26, 2020. AR 6.

On April 13, 2020, the Board wrote a letter to the parties, noting that it had received Montgomery's "Request for Relief from Filing Date." AR 1. The letter explained that the Board had determined that the petition for review was untimely and that it would issue an order that adopted the proposed decision

and order as its final order. AR 1. The Board issued the order that same day.³ AR 2.

C. Montgomery Asked the Board To Vacate Its Final Order Under CR 60(b)(1) and CR 60(b)(11)

Montgomery then filed a CR 60(b) motion to vacate the Board’s final order adopting the proposed decision and order.⁴ AR 307. She asked for relief under CR 60(b)(1) due to her attorney’s “mistake or inadvertence” and under CR 60(b)(11) on the basis that “under the circumstances of the COVID-19

³ Montgomery argues that the Board did not or “would not” consider her “Request for Relief from Filing Date.” AB 6, 9. This is incorrect. In its April 13, 2020 letter, the Board acknowledged it had received the “Request for Relief from Filing Date” but had determined the petition for review was filed late. AR 1. That the Board did not expressly reference the “Request for Relief from Filing Date” in its order adopting the proposed decision and order is immaterial. *Contra* AB 4.

⁴ While Montgomery’s CR 60 motion was pending before the Board, she appealed the Board’s final order to superior court. CP 1. The Board wrote a letter to the parties explaining that, due to the superior court appeal, it did not have authority to act on the CR 60 motion. AR 355-56. The superior court then remanded Montgomery’s appeal to the Board to consider the CR 60 motion. CP 3-4. In its remand order, the superior court ordered the Board to determine whether “the petition for review should be considered timely filed on March 26, 2020” under CR 60(b)(1) or CR 60(b)(11). CP 4.

Virus Emergency Orders issued by the governor of Washington 20-05 and 20-25 justice so requires.” AR 307.

Montgomery’s attorney filed a declaration to support the CR 60 motion. AR 308-11. He stated that he completed his draft on March 18, 2020 and put it on his legal assistant’s desk. AR 310. He reviewed the Board’s March 2, 2020 letter that extended his due date to March 24, 2020 but that he “somehow had it in [his] mind that the filing dated [sic] was on Thursday, March 26, 2020 rather than Tuesday, March 24, 2020.” AR 310. Busick attributed the error to his busy law practice:

I equate this situation to a juggler having several balls in the air at the same time, and when he adds another and then another, can you say that he is negligent in dropping one of the balls? I think not. Certainly he made a mistake in adding another ball, but that is not necessarily negligence. Here, what we have is a third person throwing the additional balls to the juggler, and he is supposed to handle them all. One would expect a ball to be dropped, which is not negligence.

AR 310.

He also noted that during this time, the COVID-19 pandemic was occurring. AR 310. He attached several proclamations from the Governor concerning the pandemic. AR 310-331. These included the Governor’s March 23, 2020 Proclamation 20-25, Stay Home – Stay Healthy. AR 324-28.

In this Proclamation 20-25, Governor Inslee ordered non-essential businesses to cease operations, effective midnight on March 25, 2020—the day after Montgomery’s petition was due—except for performing basic minimum operations. AR 327. However, non-essential businesses could perform business activities at home, as well as “minimum basic operations,” which included the minimum activities necessary to allow employees to work remotely from home. AR 327-28.

Under the proclamation, people employed in “essential business services” could leave their homes to work. AR 326. “Essential business services” included “[p]rofessional services, such as legal or accounting and tax preparation services, when necessary to assist in compliance with legally mandated

activities and critical sector service.” Appendix to Proclamation 20-25, available at WA Essential Critical Infrastructure Workers (Final).pdf.

D. The Board Denied Montgomery’s CR 60(b) Motion, and the Superior Court Affirmed

The Board denied the CR 60 motion. AR 301-03.

Addressing CR 60(b)(1), the Board concluded that “an error of office procedure such as calendaring an incorrect due date is not excusable error and cannot be the basis for extending a statutorily created deadline.” AR 302. Addressing CR 60(b)(11), the Board concluded that Montgomery did not show any connection between the pandemic and filing her petition for review late:

Although the COVID-19 pandemic and resulting proclamations are truly extraordinary circumstances, there must still be a nexus between the extraordinary circumstances and the inability to file a timely petition for review. The Governor’s stay at home proclamation dated March 23, 2020, encouraged non-essential businesses to immediately cease operations, but did not mandate they do so until after midnight on March 25, 2020—the day after the petition was due. It did not prohibit businesses conducting operations at home

without in-person contact with clients. If this proclamation impacted Mr. Busick's ability to file on March 24, 2020, he should have explained how. The prohibition did not go into effect until after the petition for review was due, and there is no explanation, even if it had prevented conducting business at home with clients, how the proclamation prevented him from filing a petition for review on March 24, 2020.

AR 302-03.

Montgomery appealed to superior court. CP 6-7.

Montgomery's trial brief asserted several facts that did not appear in Sturgis's or Busick's declarations at the Board, including that the Board's usual practice is to wait three days after the petition for review deadline to adopt a proposed decision and order. *Compare* CP 8-15 *with* AR 5-7, 308-11.

The Department moved in limine to exclude these newly asserted facts under RCW 51.52.115, which generally limits the superior court's review to the Board record:

The hearing in the superior court shall be de novo, but *the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board* in the superior court as provided in

RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court.

RCW 51.52.115 (emphasis added); CP 31-32. The trial court granted the motion in limine. CP 39-40; RP 7-10.

During oral argument at superior court, Montgomery's counsel conceded that he made a mistake about the filing deadline. RP 26. The superior court affirmed the Board's denial of the CR 60 motion. CP 42.

Montgomery appeals.

IV. STANDARD OF REVIEW

In an appeal from a superior court's decision in a workers' compensation case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the trial court's decision rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.

This Court reviews a superior court's denial of a CR 60 motion for abuse of discretion. *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn. 2d 790, 820, 490 P.3d 200 (2021). The appellate court also reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). An abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

Montgomery cites the substantial evidence standard of review, but that standard does not apply here because the Court is not reviewing factual findings. AB 8; *see Nelson v. Dep't of Lab. & Indus.*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013) (factual findings are reviewed for substantial evidence). Instead, the Court is reviewing whether the superior court abused its discretion in affirming the Board's denial of the CR 60 motion. *See Coogan*, 197 Wn.2d at 820.

V. ARGUMENT

Montgomery filed her petition late because her counsel did not keep track of the due date. The trial court therefore did not abuse its discretion in denying her motion under CR 60(b)(1) and CR 60(b)(11). An attorney's incompetence or neglect is not sufficient grounds for relief from a judgment in a civil action. *Lane*, 81 Wn. App. at 107. And the record is clear that she filed the petition late because her counsel had the wrong date "in [his] mind" (AR 310), not because COVID-19 affected his ability to file the petition.

The plain language of RCW 51.52.104 also does not permit the late filing. Under the statute, she had to file the petition "within" the time allowed by the Board. The Board allowed Montgomery until March 24, 2020 to file her petition, but she filed it two days late. Her statutory argument has no merit.

A. The Superior Court Did Not Abuse Its Discretion by Affirming the Order Denying Motion To Vacate Under CR 60(b)

Attorneys must keep track of deadlines to protect their client's interests. Montgomery's counsel explained that he filed the petition two days late because he was a "juggler who had several balls in the air at the same time" and "had it in his mind" that the filing due date on March 26, 2020. AR 310. He erroneously told his legal assistant that the due date was March 26, 2020. AR 5. The petition was filed late because Montgomery's counsel had the wrong due date in mind and decided not to check whether the date was correct while preparing the petition for filing.

Under these circumstances, the superior court acted well within its discretion when it determined that Montgomery's counsel's failure to calendar or keep track of the filing due date did not warrant CR 60 relief. It is not manifestly unreasonable or untenable to deny a CR 60 motion when a lawyer has not been diligent.

1. CR 60(b)(1) does not provide a party relief for attorney mismanagement or negligence in calendaring deadlines

Under CR 60(b)(1), a court may relieve a party from a final order for “mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order” Because a lack of diligence in keeping track of deadlines is not a basis for vacating an order on the grounds of mistake, inadvertence, or surprise under CR 60(b)(1), the trial court did not abuse its discretion in denying the motion under CR 60(b)(1).⁵

Mistakes from a lack of diligence, such as calendaring errors leading to missed deadlines, are not the type of mistakes CR 60(b)(1) contemplates. The rule’s language allows vacation

⁵ At superior court, Montgomery relied only on the grounds of “mistake” and “inadvertence” to seek relief under CR 60(b)(1). RP 24, 28. She specifically told the trial court that she was “not relying upon excusable neglect” as a basis to vacate the Board’s order. RP 24, 28. In her brief, she cites mistake, inadvertence, and surprise as the relevant grounds for relief (AB 10), but does not cite or argue excusable neglect or irregularity, so she has waived any argument on those grounds. AB 10.

when there is a “mistake” in “obtaining a judgment or order.” CR 60(b)(1). Here, though Montgomery’s counsel characterized his neglect in keeping track of the deadline as a “mistake” (RP 26), it was not a mistake in obtaining a judgment or order, as CR 60(b)(1) requires. A lawyer’s mistake does not excuse a late filing—the failure to keep track of a deadline is neglect and a lack of diligence. “Generally, the incompetence or neglect of a party’s own attorney is not sufficient grounds for relief from a judgment in a civil action.” *Lane*, 81 Wn. App. at 107; *In re Marriage of Burkey*, 36 Wn. App. 487, 490-91, 675 P.2d 619 (1984).

The trial court did not abuse its discretion when it concluded that Montgomery’s counsel’s failure to calendar his deadline did not constitute mistake or inadvertence in obtaining an order, justifying relief under CR 60(b)(1). RP 30. Case law supports that attorneys must be diligent and keep track of deadlines. “A party’s mismarking of a hearing date on their personal calendar is not good cause requiring vacation of an

order of default” *Graves v. Emp. Sec. Dep’t*, 144 Wn. App. 302, 311, 182 P.3d 1004 (2008); *see also B & J Roofing, Inc. v. Bd. of Indus. Ins. Appeals*, 66 Wn. App. 871, 876-77, 832 P.2d 1386 (1992) (attorney’s failure to a file petition for review with the Board within the statutory time period was not excusable neglect under CR 60(b)(1), even where it was timely served on the opposing party).

An apt illustration is *Arriaga v. Department of Labor & Industries*, 183 Wn. App. 817, 829, 335 P.3d 977 (2014), which agreed with the reasoning of a Board decision that is directly on point here.⁶ In *In re Robert A. Wiyrick*, No. 01 11323 & 01 12028, 2003 WL 25828990, *1-2 (Wash. Bd. Indus. Ins. App. Aug. 26, 2003), claimant’s counsel calendared the wrong deadline and filed the petition for review two days late. The Board held that “[t]he breakdown of office procedures or

⁶ Board decisions are not binding on this Court but provide persuasive authority. *Matthews v. Dep’t of Labor & Indus.*, 171 Wn. App. 477, 490 n.13, 288 P.3d 630 (2012).

secretarial error, which results in claimant's failure to file a timely petition for review, cannot be considered excusable neglect." *Id.* at *2.

The trial court's decision following these principles was reasonable and well within its discretion. Though Montgomery's counsel had weeks after receiving the March 2, 2020 letter to calendar the deadline, or to use a central or shared calendar system that office staff could use to verify the deadline, he did not do so, even as he notes that his is a "volume practice." CP 9. Montgomery presented no evidence that her counsel maintains any procedures to keep track of critical deadlines. Instead, he opted to keep the deadline in his mind, and neither he nor his staff checked the deadline in the file again after he told his legal assistant the wrong deadline.

A central calendaring system is critical for a volume practice so that office staff and lawyers are not relying on memory (or the memory of others) to file critical documents in

time. Not having a system is a recipe for disaster. On this record, it was reasonable to deny relief under CR 60(b)(1).

2. CR 60(b)(11) does not provide a party relief for attorney's mismanagement or negligence in calendaring filing deadlines, even during periods of unusual circumstances in an attorney's office

Under CR 60(b)(11), a court may also relieve a party from a final order or judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Under this ground, the party must show “extraordinary circumstances,” which are unusual circumstances that are not within the control of the party. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010).

Here, again, the trial court acted well within its discretion in denying relief on CR 60(b)(11) grounds. By Montgomery's own admission, the reason she filed the petition two days late was because her counsel had it “in his mind” that the due date was March 26, 2020 and he told his staff the wrong date. These were circumstances entirely within Montgomery's control, so

CR 60(b)(11) relief is not appropriate. Her counsel could have calendared the date, used an organized calendar system shared among staff, or taken other measures to ensure that he and his staff met the deadline, including looking in the file for the due date. A failure to track a deadline is within a party's control and is not an extraordinary circumstance.

These were the reasons that Montgomery filed her petition late, not the COVID-19 pandemic. *Contra* AB 10-11. She provides no evidence that the pandemic kept her counsel from using a calendaring system or that it caused him to have the wrong deadline in his head or to tell his staff the wrong due date. She provides no evidence that her counsel's office has a central system for calendaring critical deadlines or for catching administrative errors. Failing that, Montgomery's counsel was not reasonably diligent on behalf of his client in this matter, well before COVID-19 escalated to the point where certain businesses had to close on March 25, 2020 under the Governor's proclamation.

Montgomery argues that there is a “substantial connection or nexus between the extraordinary circumstances caused by COVID-19 and the filing of the Petition for Review,” (AB 10) but she does not explain that connection. AB 10-11. Instead, she appears to argue that simply because COVID-19 itself was an extraordinary “Act of God” beyond any party’s control, she shows “extraordinary circumstances” warranting relief under CR 60(b)(11). AB 11.

The trial court did not abuse its discretion in rejecting this argument. The “extraordinary circumstances” have to be a reason for the error. Here, had Montgomery’s counsel had the right deadline in his mind, he would have filed the petition on time. By contrast, the record illustrates that all of the events leading to Montgomery’s late filing were under her counsel’s control, as was the reason for his error in filing late. He gave his draft to Sturgis, his legal assistant, on March 18, 2020, six days before the due date (March 24, 2020) and though his legal assistant stated that she put off typing the petition until the

weekend for a variety of reasons, including “the demands of my job duties” and “dealing with the effects on our office of the Coronavirus (COVID-19), and personal concerns of my respiratory disease,” she finished typing and proofing the draft on March 23, 2020. AR 5-6; *see* AB 3. She and Montgomery’s counsel then exchanged a couple more drafts and filed the petition two days late. AR 6. Had Montgomery’s counsel calendared the due date rather than keeping it within his mind, he would have filed the petition on time, notwithstanding the pandemic.

Sturgis alleges that “the stress of COVID-19” was why she did not “check the due date” as she was not in her “normal state of mind” on March 24, 2020. AR 6. She admits that “had [she] checked the client file, [she] would have realized that the Petition was due that day.” AR 6. But this just illustrates that the real issue here was Montgomery’s counsel’s failure to calendar and keep track of the March 24, 2020 deadline in a manner that would apprise others in the office of the deadline.

And ultimately it is counsel's responsibility to supervise staff to ensure competent representation, including meeting deadlines. *See* RPC 5.1, 5.3.

The Governor's Stay Home – Stay Healthy Proclamation did not in any way affect Montgomery's late filing. Montgomery states that the proclamation demonstrated the "seriousness of the threat" (AB 10). It is undoubtedly true the proclamation showed the seriousness of COVID-19's threat to public health. But nowhere does Montgomery argue in her brief that the proclamation made her unable to file her petition on time. Nor could she plausibly claim that. The proclamation did not go into effect until March 25, 2020, the day after her filing due date, as the Board noted. And the proclamation allowed businesses to operate from home and designated legal services that had to comply with "legally mandated activities"—which would include the Board filing in this case—as essential services. Overall, the record shows that there was no correlation or nexus between the COVID-19 pandemic and Montgomery's

counsel's failure to timely file the petition for review. Proper law practice management would have prevented the error here, regardless of COVID-19.

Montgomery analogizes case law interpreting the application of RAP 18.8(b)'s extraordinary circumstances standard to this case. AB 10-11 (citing *Beckman ex rel. Beckman v. State, Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 695, 11 P.3d 313, 317 (2000); *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653, 654 (1988)). The Court should reject these arguments for two reasons. First, RAP 18.8 does not apply here, so case law interpreting it is not relevant. *See* RAP 1.1. Second, these cases do not support Montgomery's arguments.

Reichelt and *Beckman* illustrate the courts' unwillingness to extend filing deadlines—especially where the attorneys' errors are due to calendaring errors, such as here. In *Beckman*, the Court did not excuse the late filing of a notice of appeal where the appellant's office "lacked any reasonable procedure for

calendarizing hearings,” “had no central system for calendarizing hearings,” and had “no system for ‘catching’ administrative errors such as the one here.” *Beckman*, 102 Wn. App. at 695-96. *Beckman* cited the rule from *One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226 (Me. 1982) that “[t]he failure to take necessary steps, to that end, *even during periods of unusual circumstances in an attorney’s office*, is not an acceptable excuse for any resulting failure to obtain personal knowledge of the entry of judgment on the part of counsel. . .”) (emphasis added). Similarly, in *Reichelt*, the court did not allow a late notice of appeal under RAP 18.8 where counsel admitted they made a mistake in missing the appeal deadline but argued that there was no prejudice. *Reichelt*, 52 Wn. App. at 766.

By calendarizing the March 24, 2020 deadline on March 2, 2020, Montgomery’s counsel would have dispelled any later confusion about what he “got into his mind” (AR 310) about the due date or any “stress” over COVID-19 affecting Sturgis’s

state of mind that allegedly distracted her from checking the client file as the March 24, 2020 deadline approached. AR 6.

**B. Under RCW 51.52.104’s Plain Language,
Montgomery Filed Her Petition for Review Two Days
Late**

Montgomery filed her petition for review two days late. Because she requested (and received) two extensions from the Board, she had to file her petition within “*such further time as the board may allow . . .*” RCW 51.52.104 (emphasis added). Here, the Board allowed Montgomery until March 24, 2020 to file her petition. AR 2. But she filed her petition on March 26, 2020, two days late. So, she did not comply with RCW 51.52.104, and the Board and superior court correctly determined she filed her petition late. AR 2.

**1. Montgomery did not file her petition within the
time allowed by the Board, as RCW 51.52.104
requires**

Montgomery filed her petition two days after the Board’s due date, so it was late. She argues that she filed her petition before it was “deemed adopted” by the Board, so it was filed on

time. AB 1. But the “deemed adopted” date is not the filing due date, so this argument makes no sense as it ignores the statute’s plain language.

The statute’s plain language requires a party to file the petition for review “*within* twenty days, or such further time as the board may allow on written application of a party” RCW 51.52.104 (emphasis added). “Within” means “not longer in time than.”⁷ So Montgomery had to file her petition “within” the time the Board allowed, *i.e.* on or before March 24, 2020.⁸ It does not matter when the proposed decision and order was “deemed adopted.”

But Montgomery’s argument fails even on its own terms because the proposed decision and order was “deemed adopted”

⁷ Within, *Webster’s Third International Dictionary* 2627 (2002).

⁸ Because she chose to file her petition electronically, her deadline was 5 p.m. on March 24, 2020. WAC 263-12-01501(2)(d) (electronic filing outside the Board’s customary office hours “will be deemed filed on the Board’s next business day”); WAC 263-12-015(3) (listing customary hours).

on March 25, 2020—the day before she filed her petition. So she cannot even show that she filed her petition before the proposed decision was “deemed adopted.” *Contra* AB 1, 11-12. Under RCW 51.52.104, the proposed decision is “deemed adopted” the day after the petition is due, even if the Board takes no formal action:

If an order adopting the proposed decision and order is not formally signed by the board on *the day following the date the petition for review of the proposed decision and order is due*, said proposed decision and order shall be deemed adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.

RCW 51.52.104 (emphasis added).⁹ Applied here, the proposed decision and order was “deemed adopted” on March 25, 2020. RCW 51.52.104.

⁹ The Legislature added the “deemed adopted” provision in 1982. Laws of 1982, ch. 109, § 5. Before then, case law held that a proposed decision and order was not adopted by the Board until the Board affirmatively acted to adopt it. *Seese v. Dep’t of Labor & Indus.*, 73 Wn.2d 213, 218, 437 P.2d 694 (1968). But, as this Court has recognized, *Seese*’s holding was superseded by the 1982 amendment, which now makes it

Montgomery observes that the Board did not issue its order adopting the proposed decision and order until April 13, 2020 (AB 4, 12 n. 1), but that has no legal effect here. The Legislature specifically contemplated in RCW 51.52.104 that there would be occasions when the Board took no immediate action to adopt the industrial appeals judge's proposed decision. That's why it created a bright-line rule that the proposed decision and order is "deemed adopted" the day following the due date, even if the Board has not signed a formal order adopting the proposed decision. RCW 51.52.104. So the Board's delay until April 13, 2020 to issue its final order, and Montgomery's speculation that COVID-19 caused the delay, are legally irrelevant since the proposed order was deemed adopted on March 25, 2020. AB 4, 12 n. 1.

unambiguous that, even if the Board takes no action, the proposed decision and order is deemed adopted the day following the filing due date. *Wells v. Olsten Corp.*, 104 Wn. App. 135, 143 n. 3, 15 P.3d 652 (2001); *see also B & J Roofing, Inc.*, 66 Wn. App. at 876 n. 5.

2. No legal authority or Board practice provides Montgomery with an additional three days after her petition for review due date to file her petition for review

Montgomery is incorrect that she had until March 27, 2020 to file her petition for review. AB 12. She believes that she had an additional three days to file her petition because “RCW 51.52.104 provides that a petition for review is perfected by mailing” (AB 11) and the Board allows “three days for receipt of mail.” AB 12. She alleges that the Board’s procedure is “to wait until the third day following the date the [p]etition for review is due in Olympia before adopting the proposed decision and order of the industrial appeals judge.” AB 12. So, in her view, the proposed decision and order was not “deemed adopted” under RCW 51.52.104 until March 28, 2020, one day after the three-day mailing period had expired. AB 12.

This argument is wrong, and the Court should decline to consider it for two reasons. First, she did not raise it in her CR 60 motion before the Board, so it is waived. *See* CP 307; *see also Dep’t of Lab. & Indus. v. Lyons Enters., Inc.*, 185

Wn.2d 721, 743 n.5, 374 P.3d 1097 (2016) (court doesn't consider issue raised for first time on appeal).

Second, this argument is premised on two facts that are not in the record—that the Board “allows three days for receipt of mail” and that the Board’s procedure is to wait until the third day following the petition’s due date before adopting the proposed decision and order. *See* AB 12. But Montgomery asserted these two facts for the first time on appeal in her trial brief (and in a declaration attached to her reply brief) at superior court, and the superior court properly granted the Department’s motion in limine to exclude them. CP 8-15, 32, 35-37. There was no abuse in discretion in granting this motion in limine. RCW 51.52.115 prevents new evidence from being filed, absent some procedural irregularity not present here. *See Sepich v. Dep’t of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969). So they are not in the record.

Though Montgomery assigns error to the trial court’s order granting the motion in limine, she does not argue why it

was an abuse of discretion for the court to grant the motion, waiving any argument that this ruling was incorrect. AB 1; *see* RAP 10.3(a)(5), (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citations omitted) (an appellate court only considers assignments of error supported by argument, citation to authority, and references to the record.); *see also Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018) (denial of motion in limine is reviewed for abuse of discretion).

Even if the Court decides to address whether the trial court abused its discretion in granting the motion in limine, it did not. The trial court correctly applied RCW 51.52.115, which states that review at the superior court is limited to evidence presented to the Board. RCW 51.52.115; *Sepich*, 75 Wn.2d at 316 (“The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board.”); WAC 263-12-135.

Even assuming that the Board’s practice is to wait three days to allow for a mailed petition for review before it issues an order adopting the proposed decision, that changes nothing. It does not convert the March 24, 2020 due date into a March 27, 2020 due date. As discussed above, RCW 51.52.104 is unambiguous that a party must file a petition “within” the time allowed by the Board. Montgomery did not.

Montgomery points to language in RCW 51.52.104 that the “[f]iling of a petition for review is perfected by mailing or personally delivering the petition to the board’s offices in Olympia,” and says that “electronic filing was not considered” when the Legislature last amended RCW 51.52.104 in 2003. AB 11.¹⁰ Montgomery ignores that the Board has a rule that allows multiple filing methods, including electronic filing, which she took advantage of here. WAC 263-12-01501. The

¹⁰ Montgomery also cites CR 5(b)(2)(A) in support, but that rule has nothing to do with filing documents. It pertains to service on a party.

Board considers an electronic filing to occur on the same day that the filing is accomplished. WAC 263-12-01501(2)(d). Agency rules have the “force and effect of law,” as the Legislature confirmed in its delegation of rulemaking authority to the Board. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002); *see also* RCW 51.52.020 (Board’s rules on its functions and procedure have “the force and effect of law until altered, repealed, or set aside by the board”). So her filing deadline was March 24, 2020, not March 27, 2020.

Montgomery cites the doctrine of liberal construction to excuse her late filing, but she points to no ambiguous word in the statute, so the doctrine does not apply. *See* RCW 51.12.010; *Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). The doctrine applies only to the interpretation of ambiguous statutes. *See Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). The statute here is

not ambiguous: the petition for review must be filed within the time allowed by the Board. There is no ambiguity.

VI. CONCLUSION

Montgomery filed her petition late because her counsel did not keep track of the deadline. It is not manifestly unreasonable or untenable to deny a CR 60 motion when a lawyer has not been diligent. The trial court did not abuse its discretion when it denied relief under CR 60(b)(1) and CR 60(b)(11).

This document contains 5978 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 4th day of August,
2022.

ROBERT W. FERGUSON
Attorney General



RYAN HOUSER
Assistant Attorney General
WSBA # 57742
Office Id. No. 91022
Office of the Attorney General
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
360-586-7721

NO. 56838-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CATHY MONTGOMERY,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Respondent.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Brief of Respondent and this Declaration of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Derek M. Byrne
Clerk/Administrator
Court of Appeals, Division II

E-Mail via Washington State Appellate Courts Portal:

Steven L. Busick
PO Box 1385
Vancouver, WA 98666
sbusick@busicklaw.com
ashleys@busicklaw.com

DATED this 4th day of August, 2022 at Tumwater, Washington.

Jada Brown

JADA J. BROWN
Legal Assistant
(360) 586-7754

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

August 04, 2022 - 12:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56838-1
Appellate Court Case Title: Cathy Montgomery, Appellant v. Department of Labor and Industries of the State of WA, Respondent
Superior Court Case Number: 20-2-01058-1

The following documents have been uploaded:

- 568381_Briefs_Plus_20220804122719D2484340_3388.pdf
This File Contains:
Affidavit/Declaration - Service
Briefs - Respondents
The Original File Name was FINALMontgomeryRespondentBrief.pdf

A copy of the uploaded files will be sent to:

- ashleys@busicklaw.com
- nicholas.brown@atg.wa.gov
- sbusick@busicklaw.com

Comments:

Sender Name: Jada Brown - Email: jada.brown@atg.wa.gov

Filing on Behalf of: Ryan Anthony Houser - Email: ryan.houser@atg.wa.gov (Alternate Email: LIOlyCE@atg.wa.gov)

Address:
P.O. Box 40121
Olympia, WA, 98504-0121
Phone: (360) 586-7707

Note: The Filing Id is 20220804122719D2484340